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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. ~~975-976~~ 55,56

THE UNITED STATES OF AMERICA,
Petitioner,
vs.

ARNOLD W. KRUSE, AND LESTER A. KRUSE,
Respondents.

**ANSWER TO PETITION FOR WRITS OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.**

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Preliminary Statement.

Petitioner seeks to review this case on the representation that the Circuit Court of Appeals of the Seventh Circuit reversed this case on the ground that a criminal prosecution cannot be based on an indictment charging an income tax violation because the taxpayer claimed an unreasonable deduction from income, or proof only to that effect. Petitioner states this decision is of great public interest and in conflict with the decision of other courts. Such issue was never present in this case either under the indictment or the evidence. The court below made no such decision as petitioner claims. Petitioner seeks to have this court grant certiorari to pass on a principle of law not even involved herein.

Introduction.

The defendants, William Molasky, Arnold W. Kruse, James M. Ragen, Sr., James M. Ragen, Jr., and Lester Kruse were convicted of an attempt and conspiracy to evade the income taxes of the Consensus Publishing Company, an Illinois corporation (hereinafter referred to as Consensus). (R. 238-246.) These judgments were reversed and the cause remanded by the U. S. Circuit Court of Appeals for the Seventh Circuit (*U. S. v. Molasky*, 118 Fed. (2d) 128). Petitioner seeks certiorari to review the action of the Circuit Court of Appeals only as to the respondents, Arnold W. Kruse, Lester A. Kruse and James M. Ragen, Sr.¹

All defendants were employees and business associates of one M. L. Annenberg, who through a personal holding company known as the Cecelia Company dominated and controlled various corporations, including Consensus. Defendants were officers, directors, employees and in full charge of the operation of Consensus from 1929 to the time of the trial. (R. 500.) As such they were paid a certain percentage of the net profits for services rendered and to be rendered which were charged on the books as *commissions* and deducted as an expense in each and every income tax return filed by the company. *These commissions so paid were the only sums paid defendants for their services.*

Continuously from 1929 to the time of trial every item of income and every item of expense, including the commissions paid defendants, were truly and correctly reflected on the books of Consensus. These figures were in turn

¹ William Molasky and James M. Ragen, Sr. filed certain pleas in bar which were overruled. The Circuit Court of Appeals held this was error. Petitioner concedes the correctness of this ruling. (Petition 4.)

truly reflected and fully disclosed in each and every income tax return filed by the company. The income returns and the books of Consensus were audited by government agents from time to time, they were given any records or information desired and no objection was made by the government as to the payments made to the defendants for services as aforesaid or their deductions as a business expense in the income tax returns of the company. (R. 317, 318, 338, 361, 398, 425.)

In 1939 defendants were indicted in this case for an alleged scheme and conspiracy to defeat and evade the income taxes of Consensus for the years 1929 to 1936, the sole basis of which indictment was that the deduction of these commissions in their entirety as an expense for all the years in question was improper. The theory of the indictment was that defendants' employment was fictitious; that they were not in fact officers and employees of Consensus; that they rendered no services to the company, that the sums so paid as commissions were in fact *dividends* in that certain of the defendants, who received these commissions, were stockholders of the company; and therefore these sums were improperly deducted in their entirety as a business expense in the company's income tax returns.

Questions Presented.

The record presents two outstanding questions:

(1) Did the trial court err in refusing defendants' motions for directed verdicts because of the insufficiency of petitioner's evidence?

(2) Did the trial court err in its instructions to the jury?

These were the main questions presented to the Circuit Court of Appeals, analyzed and considered at length in their opinion and disposed of adversely to petitioner. Petitioner makes no attempt to answer the conclusions of the

Circuit Court of Appeals as to these issues. Petitioner here does not contend that the ultimate decision of the Circuit Court of Appeals on these questions was erroneous. Even assuming petitioner did, this Court under Rule 38 will not ordinarily grant certiorari to review such issues.

Petitioner contends that "the principal question presented is whether there is a sufficiently definite standard of guilt for the jury to convict if any services at all were rendered." (Petition 2) and refers to these principal issues in a footnote (Petition 2, footnote 1). Petitioner misstates the purport and effect of the indictment, the evidence, and the issues presented as a basis for its unfounded conclusion that the decision of the Circuit Court of Appeals in reversing these judgments is in conflict with the decisions of this Court and constitutes "a significant threat to the enforcement of the Revenue Laws" (Petition 11). Little justification for this statement can be gathered from the petition.

We believe this petition can best be answered by a short analysis of the charges of the indictment; certain uncontradicted portions of petitioner's own evidence; the law applicable and the erroneous instruction of the Court. We shall then point out that under the record in this case the petition for certiorari is without merit.

The Indictment.

The indictment (R. 2-27) consists of five counts, the first four counts charging an attempt to evade taxes for the respective years 1933 to 1936. These counts allege that Consensus had a gross income for the particular year of a certain amount, was entitled to certain specific deductions under the Revenue Act (omitting all sums paid defendants as commissions for services rendered), had a taxable income upon which a certain tax was due; that to defeat and evade income taxes of a certain specified amount defend-

ants filed an income tax return for the particular year showing a certain gross income, claiming certain deductions (which included the commissions paid), leaving a taxable income of a lesser amount upon which the proper taxes were paid. All items of gross income and deductions claimed by the government to be proper are identical with those set forth on the books of the company and in its income tax returns. Mathematical computation discloses that the alleged taxes sought to be evaded are arrived at by the complete elimination of the deductions for these commissions and the allowing to the defendants nothing for their services. *None of these counts contains any allegation charging that the deductions for these commissions were improper or why they were improper.*

The conspiracy or fifth count covers all the years in question (1929 to 1936) and is in effect similar to the substantive counts, namely, the taxes alleged to have been evaded arise out of the complete elimination of any deduction for these commissions paid the defendants. This count alleges that the deductions for these commissions were improper, in that defendants were not employees of the company and rendered no services to the company but were owners of a beneficial interest therein (stockholders) and the sums paid defendants as commissions were in fact dividends.²

The only charge in this indictment as to any evasion of

² "as the said defendants and each of them then and there well knew, the said defendants (referring to Molasky, Ragen, his son, Kruse, and his son) would not in fact be, nor were they, employed in an executive capacity or in any capacity whatsoever by the said corporation * * * during the said calendar years 1929 to 1936, both dates, inclusive, nor would they, nor did they, nor any of them, nor any one else for them, render any services to the said corporation * * * but that in fact, they, the said defendants, would be, and were, owners and holders of beneficial interests for themselves and others in the said corporation and all of the moneys to be paid and which were paid to them, and ~~each of them~~ * * * would be and were, in truth and in fact, distributions of profits and dividends from earnings of the said corporation." (R. 23.)

taxes or conspiracy to evade, was the deduction as a business expense of the commissions so paid these defendants. The only allegation as to the impropriety of these payments appears in the conspiracy count. No claim is advanced anywhere by petitioner that these payments were excessive or unreasonable in relation to the value of the services rendered. Petitioner's original position (as reflected by the indictment) was that the defendants rendered no service and therefore all the payments made were improper and wrongfully taken as a deduction in the income tax returns of the company. This was the basic fact upon which the alleged attempt and conspiracy to evade the taxes of Consensus rested.

The Evidence.

The evidence consisted of the testimony of petitioner's witnesses and documentary proof. Defendants offered no evidence.

James W. Hyland, an agent for the Bureau of Internal Revenue, testified concerning various analyses made of documents in evidence and concluded that Consensus owed the government the claimed additional taxes for the years in question. His testimony was merely a summary of the figures from the books of the company, with a complete elimination as a business expense of all sums paid defendants for commissions. He stated:

"In arriving at the tax * * * due from this company I assumed that Ragen and his son, Molasky, Kruse and his son were not entitled to one penny of commissions." (R. 439.)

Petitioner's evidence established that prior to the incorporation of Consensus it was agreed that Annenberg through Cecelia was to own Consensus and the defendants were to operate the same, for which they were to receive a certain percentage of the profits for services rendered

and to be rendered. (R. 375, 392, 416.)³ Independent of this express agreement, the defendants, irrespective of whether or not they were stockholders, would be entitled to compensation for services rendered to the company. As stated by the Circuit Court of Appeals, "We should think that the defendants would impliedly be entitled to compensation for services rendered irrespective of an express agreement relative thereto." (R. 500.)

Petitioner's evidence established that these defendants were in actual charge of the operation of this company continuously from 1929 to the time of the trial and employed by it. In its opening statement, petitioner claimed that William Molasky only performed considerable work. Counsel for the government stated:

"The defendants Arnold W. Kruse and James M. Ragen had very little if anything to do in the operation of the company's business * * * William Molasky actually ran the business and did considerable work." (R. 550.)

Petitioner here admits: "Molasky and Arnold Kruse undoubtedly did perform some services. (R. 322, 323, 326, 341, 354, 355.)" (Petition 8.)

Petitioner now contends that the record discloses that neither Ragen, Sr., Ragen, Jr., nor Lester Kruse worked for the company. In support of this unfounded statement petitioner cites the testimony of the witness Burris, a book-keeper, to the effect that he had no knowledge of any work that Lester Kruse, Ragen, Sr. or Ragen, Jr. did (Petition 8), omitting Burris' further testimony that he, Burris,

³ "The Circuit Court of Appeals said:

"Furthermore, defendants contend that there was an agreement in 1929, prior to the incorporation of Consensus, between them and Annenberg, that Cecelia should take 30% of the profits as the owner of the business, Molasky 30%, and Ragen, Sr., and Arnold Kruse each 20% as compensation for services in the operation of the company. There is testimony which sustains this contention. True, the Government argues that it is unbelievable, even though it came from Government witnesses." (R. 500.)

was not in a position to know what work they did. (R. 344.) This is far from establishing that these defendants rendered no services. The record shows that Ragen, Sr., Ragen, Jr., and Lester Kruse also performed services for the company and that all defendants were paid these commissions for such services. (R. 322, 351, 354, 355, 359, 385, 387, 388, 392.) The corporate minutes and employment contracts were of like effect. Both the trial court and the United States Circuit Court of Appeals after reviewing the evidence concluded that it disclosed that all defendants had in fact performed services and were entitled to compensation therefor.⁴ These commissions were the only compensation paid for such services.

Under the record and findings of both the trial and appellate court we must assume that defendants rendered services to Consensus for which they were paid these commissions. Petitioner concedes this court will not grant certiorari to review the record as to this question of fact. (Petition 10.)

⁴ The trial court said:

"In other words, once having shown,—and this evidence does show,—that they rendered,—some of them at least, and perhaps all of them, perhaps all of them,—that they rendered some services: Now having shown that they rendered some services and that they received these things as commissions, haven't you got to go further and show, in order to create a fraudulent intent that these commissions received were all out of proportion to the services rendered?" (R. 463.)

The U. S. Circuit Court of Appeals said:

"We think there is considerable testimony in the record of services rendered by Molasky, who was president of Consensus, as well as by Kruse, Sr., and some evidence of services performed by the other defendants." (R. 500.)

"The proof shows without doubt that they rendered services to Consensus and were entitled to compensation in the form of salary or otherwise." (R. 503.)

Law Applicable.

Petitioner as a basis for its claim that defendants attempted or conspired to evade the income tax of Consensus had the burden of establishing the limited charges of its indictment, namely, that defendants were not employees, performed no services for the company and therefore these commissions paid were improperly deducted as a business expense. From the evidence heretofore analyzed, it conclusively appears that defendants were in fact employees, performed services in the management and operation of the business for which they were paid these commissions pursuant to a bona fide agreement at the time of the corporation of the company. Further, as pointed out by the Circuit Court of Appeals, defendants would impliedly be entitled to compensation for these services.

Petitioner never claimed nor offered evidence that these commissions so paid were excessive or unreasonable in relation to the services performed by the defendants. The Circuit Court of Appeals said: "There was no proof and no effort by the government to show that the services disclosed constituted the total of those performed and no effort to show the reasonable value of such services". (R. 500.) There was no evidence in the record that any of the payments so made were improper or wrongfully taken as a deduction in the income tax returns of the company. Under these circumstances, there was a complete failure of proof to establish the charges of the indictment; the trial court erroneously denied defendants' motions for directed verdicts and the Circuit Court of Appeals correctly reversed the judgments of conviction.

Petitioner having failed to prove that the commissions paid were unreasonable in relation to the value of the serv-

ices rendered, there was no factual basis from which a jury could determine that part of the commissions so paid were compensation for services rendered and part dividends to stockholders. Petitioner accordingly argued in the Circuit Court of Appeals that there was no middle ground and that the deductions in question had to be treated either as dividends in their entirety and if so unlawful deductions, or as commissions in their entirety and therefore properly deducted.⁵

Petitioner argued below (R. 501) and argues here (Petition 15, footnote 9) that the fact that defendants rendered services to the company for which they were entitled to compensation was and is immaterial because the commissions so paid were in fact dividends in that (1) they were so described in some instances on the work sheets and reports prepared by the bookkeepers; and (2) that part of the commissions so paid were paid to certain of the defendants in the same proportion as their alleged stock holdings. The first contention is without factual support in that the bookkeepers who prepared these work sheets and weekly reports testified that where they described the payments made to the defendants as "dividends" it was pure neglect or error on their part. (R. 337, 361, 413.) The second contention is without merit in that the fact that these commissions were paid to stockholders does not make them dividends in the absence of some evidence that the

⁵ The U. S. Circuit Court of Appeals said:

"The Government in its brief and in oral argument before this Court asserts that the deductions in question must be treated either as dividends in their entirety, and if so as unlawful deductions, or as commissions in their entirety, and therefore properly deducted. In other words, in accordance with this argument there can be no middle ground." (R. 502)

payments were excessive in relation to the services rendered.

Austin v. U. S. (C. C. A. 5) 28 Fed. (2d) 676.

Wm. S. Gray & Co. v. U. S. (C. of C.) 35 Fed. (2d) 968.

Treasury Regulations.⁶

Under the above authorities even in a civil case, the basic question is always whether or not the amounts paid as compensation are reasonable in relation to the value of the services rendered. The deductions in question were proper irrespective of whether they were made to persons who were also stockholders unless the payments so made were unreasonable in relation to the value of the services performed. If unreasonable, the excessive amount and that alone may be considered as a dividend. Having failed in its proof to the effect that the sums so paid were unreasonable, petitioner's present claim that all of these payments were dividends is without factual support.

There was no factual basis from which the jury could

⁶ Regulations 19.23(a) 6.--(Reg. 163 Income Tax):

"Compensation for Personal Services-- * * * The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services. This test and its practical application may be further stated and illustrated as follows: * * * (a) An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services, and the excessive payments correspond or bear a close relationship to the stock holdings of the officers or employees, **it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock.** * * *

"(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. * * * (Boldface ours.)

infer, much less find, that these commissions, or any part of them were dividends. Under the undisputed facts in evidence, these commissions so paid, were not dividends as a matter of law. Petitioner's case has no support in fact or law and the Circuit Court of Appeals correctly held that the trial court erred in refusing to direct verdicts in favor of defendants.

The Erroneous Instruction of the Court.

The trial court erroneously instructed the jury that they could find all the defendants guilty if they found only that a substantial part of the commissions paid were in fact dividends. There being no evidence in the record from which a jury could make such a finding, the instruction was erroneous. It is difficult to understand upon what theory petitioner can justify this instruction in the light of its own theory that the deductions in question must be treated either as dividends in their *entirety* and if so unlawful deductions, or as commissions in their *entirety* and therefore properly deducted. As stated by the Circuit Court of Appeals:

"This statement (referring to the cited portion of the Court's instructions) was neither consistent with the indictment nor the theory upon which the case was tried." (R. 503.)

Appellee seeks to justify this instruction on the theory that the government is not required to prove an evasion of

"It is for you to decide whether these were or whether a substantial portion thereof, was a distribution of profits rather than the compensation of employees. I use the words 'these sums or a substantial portion thereof'. It is not necessary for the government under this indictment to prove that all of the sums so distributed to these defendants were profits. • • • It is sufficient if you find beyond a reasonable doubt that the defendants intentionally diverted profits of this concern, in the amounts charged in the indictment, or substantial parts thereof, diverted them from the form of profits and received them in the form of commissions." (R. 472.)

all the tax charged.⁶ This principle of law has never been disputed. Assume A. is charged with having a certain income of \$20,000. and evading a tax of \$3,000. It is sufficient if the proof shows he has an income of \$15,000. and evaded a tax of \$2,000. This principle of law, however, has no application here. The alleged evasion of taxes in this case relates not to the *amount* of taxes but to the propriety of a specific deduction taken. The real and only issue here was whether these deductions for commissions were proper or improper in their *entirety*. Yet the jury were instructed that they could convict by finding only that a part of the commissions were properly deducted and a part improperly deducted.

Petitioner seeks to justify this instruction on the theory that the jury might have found that in some years one of the defendants rendered no services at all or that as to some of the defendants some or all the payments were profits in their entirety. (Pet. 11, footnote 6.) There was no evidence in the record from which a jury could make such a finding.

The trial court in effect instructed the jury that they could convict the defendants by finding only that part of the sums paid were for services rendered and part were dividends. This necessarily required as a basis facts from which the jury could make this determination; that is, facts from which the jury could find that part of the sums paid were for services rendered and part were dividends. Unless these facts were present the jury could not make such a determination. There being no such evidence in the record, the verdict of the jury was based on mere speculation and conjecture. The instruction in question under the indictment, evidence and theory of petitioner's case was erroneous.

⁶ *Gleckman v. U. S.* (C. C. A. 8) 80 Fed. (2d) 394; Certiorari Denied, 297 U. S. 709 (Pet. 11, footnote 6).

The above matters were fully considered by the Circuit Court of Appeals in its opinion, the problems presented were carefully analyzed, the court reached the conclusion that the trial court had erred in denying defendant's motions for directed verdict and had erroneously instructed the jury, and according reversed and remanded the case. The above analysis indicates the correctness of the conclusions of the Circuit Court of Appeals—this is particularly true in that petitioner here makes no serious contention that these ultimate conclusions of the Circuit Court of Appeals were erroneous. We now refer to the Petition for Certiorari.

The Petition for Certiorari Is Without Merit.

The original theory of petitioner's case was that the defendants were not employees of Consensus, performed no services for it and consequently, all sums paid them were in fact dividends in that certain of the defendants were stockholders of the company. If dividends they were of course not deductible as a business expense and their inclusion as such in the income tax returns of the company might well constitute a scheme or conspiracy to evade taxes. When its own evidence established that the defendants were in fact employees of the company and had rendered services for the commissions paid, the bottom fell out of petitioner's case.

From that time there have been continuous shifts of petitioner's position in a vain attempt to sustain these judgments of conviction. When faced with the fact that their own evidence established that services had been rendered, they contended that the question of services was immaterial and so contend here. When faced with the fact that they failed to show that the payments made for these services were excessive or unreasonable they claimed that under their theory the question of excessiveness or unreasonable-

ness of the payments so made was immaterial in that the commissions so paid were either commissions in their entirety and properly deducted, or dividends in their entirety and improperly deducted—that there was no middle ground.

Without questioning the correctness of the ultimate decision of the Circuit Court of Appeals, petitioner now seeks to have this court review this case on the theory that the Circuit Court of Appeals in its opinion laid down certain new principles of law, (to the effect that a criminal prosecution cannot be based on the theory only that a certain deduction is unreasonable when the statute permits a reasonable deduction), which constitute “a significant threat to the enforcement of the revenue laws.” These so-called new principles of law were not even involved in the ultimate questions decided by the court.

In analyzing this case, the Circuit Court of Appeals agreed with petitioner’s position that there was no middle ground and that the commissions so paid were either proper or improper in their entirety and pointed out that this was the theory of the indictment and further said:

“It is a serious question whether a prosecution for income tax evasion founded upon improper deductions can succeed where the proof is other than that the deductions are improper in their entirety”. (R. 502.)

The Court then said:

“Section 23(a) of the Internal Revenue Code, 26 U. S. C. A. Int. Rev. Code §23 (a) allows deductions in computing a net income for ‘all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *. The reported cases, dealing with criminal responsibility for tax evasion, are, so far as we are aware, predicated upon a failure to file a return, or if filing a return, failure to report the correct gross income. We find no case where the evasion charged was based upon an improper deduction. We have reached the conclu-

sign that where a statute permits a reasonable deduction for services, a criminal prosecution can not be maintained by proof other than that such services were not rendered. It is not sufficient to allege or prove that a deduction claimed for services is unlawful because the amount charged is unreasonable. Such a charge would leave to the trier of the facts the responsibility for fixing the standard by which a defendant's guilt would be determined. The standard would vary according to the views of different courts and juries. Such a theory would be violative of the defendant's constitutional rights, and void. *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221, 34 S. Ct. 853, 58 L. Ed. 1284; *Collins v. Kentucky*, 234 U. S. 634, 34 S. Ct. 924, 58 L. Ed. 1510."

Petitioner now claims that this latter statement in effect establishes some new standard of guilt (Petition 2); that it places a "wholly unwarranted limitation into Section 145b of the Revenue Act" (Petition 13), and that it prevents a prosecution for an unlawful deduction. This statement must be considered in connection with the facts before the court and in connection with the petitioner's own theory of the case which was then being dealt with. Certainly the decisions of this court cited by the lower court raise a serious question whether a criminal action can be based on the theory only that a particular deduction for salary was unreasonable under Section 23(a). Petitioner cites no cases holding to the contrary. Irrespective of the court's conclusion as to this matter, it was not pertinent to the ultimate questions decided.

Petitioner in its petition for rehearing claimed below and here intimates that this language in effect holds that a prosecution for income tax evasion cannot be based upon an unlawful deduction. That the court did not so hold is best emphasized by the illustrations which immediately follow the above quoted statement. Petitioner claims that

the opinion of the court below is in direct conflict with the case of *United States v. Kelley* (C. C. A. 2), 105 Fed. (2d) 912, which involved unlawful deductions. In the *Kelley* case defendants took certain deductions based on a fabricated inventory and repeated deductions in successive years for the same bad debt, these deductions being false *in toto*. Petitioner intimates that in connection with the fabricated inventory there was some question of reasonable value involved (Petition 12). The facts were that the government proved that in the fabricated inventory the defendants placed a valuation on the cars, wagons and animals in excess of their actual cost. (See 105 Fed. (2d) 915.) The *Kelley* case in no way conflicts with the decision of the court below in this case; in fact, it comes squarely within the illustrations contained in the court's opinion. Petitioner also refers this court to the case of *In re Zimmerman*, (C. C. A. 7), 108 Fed. (2d) 370. The opinion in that case was written by the same judge who wrote the opinion in this case and there are no similar questions in these two cases present here. The court below specifically recognized that a tax evasion case could be based on an unlawful deduction. (R. 503.)

Petitioner picks out certain portions of these statements by the court and then draws the far-fetched inference that they laid down some new principle of law, wholly ignoring their application to the issues in this case. Typical of this is the following:

Petitioner states:

"The court below, however, ruled in terms (R. 502) that 'where a statute permits a reasonable deduction for services a criminal prosecution cannot be maintained by proof other than that such services were not rendered.' " (Petition 10.)

Certainly this statement is clearly applicable to the record in this case. Under the pleadings here petitioner's theory was that the defendants had rendered *no* services.

Petitioner refers to various provisions of the Internal Revenue Code, permitting "reasonable" deductions (Petition 13, footnote 8) and then argues as follows:

"The department in its prosecution policy has not considered that wilful tax evasion was exempt simply because tax items were involved as to which honest men might differ." (Petition 14.)

Be that as it may, this court has specifically held in the very cases cited by petitioner and referred to by the Circuit Court of Appeals, that a criminal prosecution could not be based on any such theory.

Petitioner not only failed to prove that any of the deductions in question were excessive or unreasonable but further claimed that proof on these questions was immaterial in that these deductions were either proper or improper in their entirety. Under these circumstances, petitioner should not now be entitled to certiorari on the claim that the statement of the court below, that it is a serious question whether a tax evasion case could not be based only on the theory that a deduction was unreasonable where a statute permitted a reasonable deduction, was inaccurate. The accuracy or inaccuracy of the statement criticized cannot and does not under the issues here affect the ultimate decision of this case. This case was reversed and remanded on the theory that petitioner's evidence was insufficient and that the jury was not correctly instructed. It was not reversed on the theory that petitioner's proof, that certain deductions were unreasonable, did not constitute a crime. If this were true the case would not have been remanded. **Petitioner asks this court to review this case on a principle of law not even involved in the case.**

Conclusion.

The Circuit Court of Appeals carefully analyzed the real issues in the case and correctly disposed of them adversely to petitioner. Petitioner does not contend here the ultimate decision of the Circuit Court of Appeals was erroneous. The petition for certiorari is just another shift in position on the part of petitioner in an attempt to sustain a judgment of conviction, which has no foundation in law or in fact.

We respectfully submit that the petition for certiorari should be denied.

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